

## CIVIL COVER SHEET

JS 44 - CAND (Rev. 11/04)

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO.)

## I. (a) PLAINTIFFS

FIREMAN'S FUND INSURANCE COMPANY,

## DEFENDANTS

DISCOVER PROPERTY &amp; CASUALTY INSURANCE COMPANY and DOES 1 through 10

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Marin County  
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT \_\_\_\_\_

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

KENNEY & MARKOWITZ L.L.P.  
255 California Street  
Suite 1300  
San Francisco, CA 94111  
415.397.3100

ATTORNEYS (IF KNOWN)

## II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- |   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. ORIGIN

(PLACE AN 'X' IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

## V. NATURE OF SUIT (PLACE AN 'X' IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury Med Malpractice <input type="checkbox"/> 365 Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (US Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 460 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 860 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Amer w/ disab - Empl <input type="checkbox"/> 446 Amer w/ disab - Other	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 610 Motion to Vacate Sentence <input type="checkbox"/> 630 General <input type="checkbox"/> 635 Death Penalty <input type="checkbox"/> 640 Mandamus & Other <input type="checkbox"/> 650 Civil Rights <input type="checkbox"/> 655 Prison Condition		

## VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ 732,000  
UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ YES ☐ NO

## VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE  
"NOTICE OF RELATED CASE".

## IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)

(PLACE AN 'X' IN ONE BOX ONLY)

☐ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE June \_\_, 2008

SIGNATURE OF ATTORNEY OF RECORD DAVID W. GORDON

1 DAVID W. GORDON (SBN 71003)  
2 KENNEY & MARKOWITZ L.L.P.  
255 California Street, Suite 1300  
3 San Francisco, CA 94111  
Telephone: (415) 397-3100  
4 Facsimile: (415) 397-3170

Attorneys for Plaintiff  
5 FIREMAN'S FUND INSURANCE COMPANY

6  
7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA  
9 SAN FRANCISCO DIVISION

10  
11 FIREMAN'S FUND INSURANCE  
12 COMPANY,

13 Plaintiff,

14 v.

15 DISCOVER PROPERTY & CASUALTY  
16 INSURANCE COMPANY,

17 Defendant.

CV 08

CASE NO.

3079  
BZ

COMPLAINT FOR CONTRIBUTION,  
SUBROGATION, INDEMNITY AND  
DECLARATORY RELIEF

BY FAX

18  
19 PLAINTIFF FIREMAN'S FUND INSURANCE COMPANY ALLEGES AS FOLLOWS:

20 THE PARTIES

21 1. Plaintiff Fireman's Fund Insurance Company ("Fireman's Fund") is now and at all  
22 times mentioned in this complaint has been a corporation licensed to do business in the State of  
23 California.

24 2. Defendant Discover Property & Casualty Insurance Company ("Discover") is now  
25 and at all times mentioned in this complaint has been an insurer licensed to do business in the  
26 State of California.

27 Kenney  
&  
Markowitz  
28 L.L.P.

**JURISDICTION AND VENUE**

3. Fireman's Fund is a corporation organized under the laws of the State of California, having its principal place of business in Novato, California.

4. Discover is a corporation incorporated under the laws of the State of Illinois, having its principal place of business in Chicago, Illinois.

5. This Court has jurisdiction pursuant to 28 U.S.C. §1332 in that the matter in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different states.

6. Personal jurisdiction over Discover exists in this Court on the basis that Discover is licensed to do business in the State of California, including in the Northern District of California.

7. Venue is proper in this district under 28 U.S.C. §1391(c) in that Discover is deemed to reside in any judicial district in which it is subject to personal jurisdiction.

**GENERAL ALLEGATIONS**

8. On or about June 26, 2004, Margaret Melhado ("Melhado") sustained personal injuries when she fell while attempting to attend a book signing event sponsored by Esowon Books, Inc. ("Esowon") involving former president Bill Clinton's appearance at Esowon's Los Angeles, California store. Esowon's Los Angeles store is in a strip mall owned by Baldwin Hills Investors, Ltd. ("Baldwin Hills").

9. On February 24, 2006, Melhado filed a complaint for damages in the Superior Court of the State of California for the County of Los Angeles, Case No. BC327107, naming Baldwin Hills, Esowon and others as defendants. This action is referred to hereafter as "the Melhado action."

10. Baldwin Hills and Esowon were parties to a lease ("the Lease"), which was in effect on June 26, 2004. In the Lease, Esowon agreed to defend, indemnify and hold harmless Baldwin Hills against any and all claims arising out of Esowon's use of the premises and from any activity permitted by Esowon. Esowon also agreed in the Lease to name Baldwin Hills as an additional insured under its commercial general liability ("CGL") insurance policy issued by Discover, Policy No. D 177 B00604. The Lease provided, inter alia:

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1           **16. HOLD HARMLESS AND INDEMNITY.** Tenant shall hold  
 2           Landlord harmless and indemnified at all times against any claims,  
 3           loss, damages, cost or expense, including reasonable attorneys' fees,  
 4           by reason of Tenant's failure to perform any obligation to be  
 5           performed by Tenant under the terms of this Lease or from Tenant's  
 6           use of the demised premises or from any activity, work or things done  
 7           or permitted by Tenant, its contractors, agents, employees, licensees  
 8           or invitees in or about the demised premises or elsewhere. Tenant  
 9           covenants and agrees that in case Landlord shall without fault on its  
 10          part be made a party to any litigation commenced by or against  
 11          Tenant, then Tenant shall pay all costs and expenses, including  
 12          attorneys' fees, incurred by or imposed on Landlord by or in  
 13          connection with such litigation, and also shall pay all costs and  
 14          expenses, including attorneys' fees, which may be incurred by  
 15          Landlord in enforcing any of the covenants and agreements of this  
 16          Lease, and all such costs, expenses and attorneys' fees shall, if paid  
 17          by Landlord herein, be so much additional rent due on the next rent  
 18          date after such payment or payments. (Emphasis added.)

19           11. Fireman's Fund issued to Baldwin Hills as a named insured CGL Policy No. MZX  
 20          80819489, effective from October 1, 2003, to October 1, 2004 ("the Fireman's Fund policy").  
 21          Under the terms of the Fireman's Fund policy, Fireman's Fund was to provide Baldwin Hills with  
 22          a defense and indemnification against certain liability suits, subject to the policy terms, conditions  
 23          and exclusions and subject to other insurance.

24           12. At all relevant times, Esowon was insured under a CGL policy, Discover Policy  
 25          No. D 177 B00604 ("the Discover policy"). Pursuant to the Lease, the Discover policy named  
 26          Baldwin Hills as an additional insured. Under the terms of the Discover policy, Discover was  
 27          required to provide Baldwin Hills with a defense and indemnification in the *Melhado* action.

28           13. The Discover policy also included contractual liability coverage for Esowon's  
 obligations under the Lease to defend, indemnify and hold harmless Baldwin Hills.

          14. Melhado's accident and personal injuries were sustained while the Discover policy  
 was in effect.

          15. Discover was aware of and had notice of the pendency of the *Melhado* action.  
 Fireman's Fund tendered the defense and indemnification of Baldwin Hills in the *Melhado* action  
 to Discover.

          16. Discover refused to defend or indemnify Baldwin Hills in the *Melhado* action.

          17. Fireman's Fund provided Baldwin Hills with a defense and indemnity in the  
*Melhado* action. Fireman's Fund paid \$700,000 in settlement of the *Melhado* action and paid over



1 \$32,000 to defend that action.

2 **FIRST CLAIM FOR RELIEF**

3 **(Equitable Subrogation)**

4 18. Fireman's Fund realleges Paragraphs 1 through 17 of this complaint inclusive, and  
5 incorporates those paragraphs by reference as though fully set forth in this claim for relief.

6 19. The coverage provided to Baldwin Hills under Discover's policy and certificate of  
7 insurance is primary to the coverage provided Baldwin Hills under the Fireman's Fund policy.

8 20. Discover refused to participate in Baldwin Hills' defense of the *Melhado* action and  
9 refused to indemnify Baldwin Hills for the settlement in that action.

10 21. Because of Discover's conduct, Fireman's Fund was required to defend and  
11 indemnify Baldwin Hills, and thereby incurred costs in defending and settling the *Melhado* action.

12 22. Discover is solely responsible for those costs of defense of the *Melhado* action that  
13 were paid by Fireman's Fund and for the settlement of the *Melhado* action.

14 **SECOND CLAIM FOR RELIEF**

15 **(Equitable Contribution)**

16 23. Fireman's Fund realleges Paragraphs 1 through 17 of this complaint, inclusive and  
17 incorporate those paragraphs by reference as though fully set forth in this claim for relief.

18 24. This claim for equitable contribution is pleaded in the alternative to the claim for  
19 equitable subrogation.

20 25. Fireman's Fund and Discover provide coverage each as a proportionate share for  
21 the liability of Baldwin Hills in the *Melhado* action.

22 26. As co-insurers, the cost of defending Baldwin Hills against the *Melhado* action and  
23 the cost of settling the *Melhado* action should be borne by each insurer proportionately.

24 27. Discover should be required to reimburse Fireman's Fund for its proportionate  
25 share of the *Melhado* settlement and its proportionate share of the defense fees and costs expended  
26 by Fireman's Fund in the *Melhado* action.

27 Kenney  
&  
28 Markowitz  
L.L.P.

**THIRD CLAIM FOR RELIEF**

**(Indemnity)**

28. Fireman's Fund realleges Paragraphs 1 through 17 of this complaint, inclusive and incorporates those paragraphs by reference as though fully set forth in this claim for relief.

29. Discover has and had an obligation to defend and indemnify Baldwin Hills in the *Melhado* action.

30. Discover failed to defend and indemnify Baldwin Hills in the *Melhado* action.

31. Because of Discover's conduct, Fireman's Fund was required to defend and indemnify Baldwin Hills in the *Melhado* action.

32. Fireman's Fund paid \$700,000 to settle the *Melhado* action and paid additional sums to defend Baldwin Hills in that action.

**FOURTH CLAIM FOR RELIEF**

**(Declaratory Relief)**

33. Fireman's Fund realleges Paragraphs 1 through 17 of this complaint, inclusive and incorporates those paragraphs by reference as though fully set forth in this claim for relief.

34. An actual controversy has arisen and now exists between Fireman's Fund on the one hand and Discover on the other hand regarding whether Discover had and has any duties to defend Baldwin Hills and indemnify Baldwin Hills for all or any portion of the settlement in the *Melhado* action. Specifically, and without limitation, Fireman's Fund contends that Discover had a duty to defend and indemnify Baldwin Hills in the *Melhado* action, and that Discover's defense and indemnity obligations arise out of the Discover policy, the certificate of insurance and the Lease between Baldwin Hills and Esowon. Discover disputes these contentions and contends that it had and has no obligation to defend and indemnify Baldwin Hills in the *Melhado* action.

35. Fireman's Fund therefore seeks a judicial determination of the parties' respective rights and obligations under the Fireman's Fund policy, under the Discover policy and certificate of insurance, and under the Lease between Baldwin Hills and Esowon.

36. Fireman's Fund seeks a judicial determination that Discover has a duty to pay all of the defense fees and costs paid by Fireman's Fund in the *Melhado* action and that Discover has a

duty to pay the \$700,000 settlement in the *Melhado* action. Alternatively, Fireman's Fund seeks a judicial determination that Discover has a duty to pay its proportionate share of the defense fees and costs in the *Melhado* action and that Discover has a duty to pay its proportionate share of the \$700,000 *Melhado* settlement.

### PRAYER FOR RELIEF

Wherefore, Fireman's Fund demands judgment against Discover as follows:

1. On the First Claim for Relief:

- (a) For the entire cost of settling the *Melhado* action, in the amount of \$700,000;
- (b) For the cost of defending Baldwin Hills in the *Melhado* action according to proof;
- (c) For interest, at a legal rate, on the amounts expended by Fireman's Fund in defending and settling the *Melhado* action;
- (d) For costs of suit; and
- (e) For other relief that the Court deems proper.

2. On the Second Claim for Relief:

- (a) For Discover's proportionate share of the settlement in the *Melhado* action according to proof;
- (b) For Discover's proportionate share of the costs of defending Baldwin Hills in the *Melhado* action according to proof;
- (c) For interest, at a legal rate, on the amounts Discover owes Fireman's Fund for defending and settling the *Melhado* action;
- (d) For costs of suit; and
- (e) For other relief that the Court deems proper.

3. On the Third Claim for Relief:

- (a) For the entire cost of settling the *Melhado* action in the amount of \$700,000;
- (b) For the cost of defending Baldwin Hills in the *Melhado* action according to

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&  
Markowitz  
L.L.P.

1 proof;

2 (c) For interest, at the legal rate, on the amounts expended by Fireman's Fund  
3 in defending and settling the *Melhado* action;

4 (d) For costs of suit; and

5 (e) For other relief that the Court deems proper.

6 4. On the Fourth Claim for Relief:

7 (a) For a judicial declaration of the respective rights and obligations of  
8 Fireman's Fund and Discover under the Fireman's Fund policy, the  
9 Discover policy and certificate of insurance and the Lease, including a  
10 declaration that Discover had an obligation to defend and indemnify  
11 Baldwin Hills with respect to the *Melhado* action.

12 (b) For costs of suit; and

13 (c) For other relief that the Court deems proper.  
14

15 DATED: June \_\_, 2006

**KENNEY & MARKOWITZ L.L.P**

16  
17 By: \_\_\_\_\_

DAVID W. GORDON  
ELIZABETH L. DOLTER  
Attorneys for Plaintiff  
FIREMAN'S FUND INSURANCE  
COMPANY  
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27 Kenney  
&  
28 Markowitz  
L.L.P.



**DEMAND FOR JURY TRIAL**

Fireman's Fund hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED: June 25, 2006

**KENNEY & MARKOWITZ L.L.P**

By: David W. Gordon  
DAVID W. GORDON  
Attorneys for Plaintiff  
FIREMAN'S FUND INSURANCE  
COMPANY

Kenney  
&  
Markowitz  
L.L.P.